In The

Supreme Court of the United States

October Term, 1974

No. 73-1309

JEFFREY COLE BIGELOW,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

On Appeal from the Supreme Court of Virginia

BRIEF FOR APPELLEE

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OPINIONS BELOW

The opinion of the Supreme Court of Virginia entered upon remand from this Court is reported at 214 Va. 341, 200 S.E.2d 680 and is set forth at J.S. 21a-22a.* The order of this Court vacating the earlier decision of the court below and remanding the case for further consideration is reported at 413 U.S. 909 and is set forth at J.S. 20a. The earlier opinion of the Supreme Court of Virginia is reported at 213 Va. 191, 191 S.E.2d 173 and is set forth at J.S. 1a-11a.

* Citations in this brief in the form "J. S. ....." refer to the Appendix to the Appellant's Jurisdictional Statement. Citations in the form "A. ....." refer to the Appendix filed herein.

The judgment of conviction in the Circuit Court, Albemarle County, Virginia, is not reported and is set forth at J.S. 14a-15a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). The statement was timely filed. Probable jurisdiction was noted on July 8, 1974.

CONSTITUTIONAL AND STATUTORY PROVISIONS

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." U.S. Const. Amend. I.

* * *

"If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." Va. Code Ann. § 18.1-63.

QUESTIONS PRESENTED

1. Whether a state, exercising its police powers to protect the health, safety and welfare of its citizens, may prohibit purely commercial advertisements of commercial abortion referral agencies?

2. Whether a person, whose conduct was of a purely commercial nature and therefore within the hard core of activity prohibited by a statute and not protected by the First Amendment, has standing to raise the hypothetical rights of others who cannot possibly be affected because the

statute, even prior to its amendment, was authoritatively construed to prohibit only commercial activity?

STATEMENT

The Appellant was a director, managing editor and responsible officer of the Virginia Weekly, a newspaper distributed in the Charlottesville area.[1] The February 8, 1971, issue of the Virginia Weekly, which was published and circulated in Albemarle County, Virginia, carried the following advertisement on page 2:

UNWANTED PREGNANCY
LET US HELP YOU

Abortions are now legal in New York.
There are no residency requirements.

FOR IMMEDIATE PLACEMENT IN ACCREDITED HOSPITALS AND CLINICS AT LOW COST

Contact

WOMEN'S PAVILION
515 Madison Avenue
New York, N. Y. 10022

or call any time

(212) 371-6670 or (212) 371-6650
AVAILABLE 7 DAYS A WEEK

STRICTLY CONFIDENTIAL. We will make all arrangements for you and help you with information and counseling.

[1] There is no evidence in the record to support Appellant's contention that the Virginia Weekly is an underground newspaper.

The publication and circulation of the February 8th issue of the Virginia Weekly were the direct responsibility of the Appellant.

The Appellant was arrested on the charge of unlawfully encouraging or prompting the procuring of abortion in violation of § 18.1-63 of the Code of Virginia, which provided as follows:

> "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor."[2]

The Appellant was tried in the County Court of Albemarle County on May 27, 1971, found guilty and given a fine of $500.00, of which $350.00 was suspended. Thereafter, the Appellant appealed to the Circuit Court of Albemarle County where, on June 15, 1971, he was given a *de novo* trial before the court, having waived his right to trial by jury. For purposes of appeal to the circuit court, the parties entered into a stipulation of facts. (A. 3, 8.)

The Circuit Court found the Appellant guilty and fined him $500.00, of which $350.00 was suspended on condition that the Appellant not violate § 18.1-63 again. (J.S. 15a.)

An appeal to the Supreme Court of Virginia was later perfected and a writ of error was granted to review the proceeding. (J.S. 16a-17a.) The Appellant raised two issues before the Supreme Court of Virginia: (1) whether the

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[2] Effective July 1, 1972, § 18.1-63 was amended and now provides:

> "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or through the use of a referral agency for profit, or in any other manner; encourage or promote the processing of an abortion or miscarriage to be performed in this State which is prohibited under this article, he shall be guilty of a misdemeanor."

advertisement in question violated § 18.1-63 of the Code of Virginia and (2) whether § 18.1-63 was violative of the First Amendment. (213 Va. at 193, 197, 191 S.E.2d at 174, 177; J.S. 2a and 17a.) the court rejected both contentions. First, it held that the advertisement "clearly exceeded an informational status" and "constituted an active offer to perform a service," and thus violated both the letter and intent of § 18.1-63. (213 Va. at 193, 191 S.E.2d at 174; J.S. 3a.)

Next, the court below found the advertisement to be purely commercial (213 Va. at 193-94, 198, 191 S.E.2d at 174-75, 177; J.S. 3a-4a, 10a.) and thus subject to regulation by the state. (213 Va. at 194-97, 191 S.E.2d at 175-77; J.S. 4a-9a). It then held the statute to be a valid exercise of the state's police power (213 Va. at 196-97, 191 S.E.2d at 176-77; J.S. 7a, 9a.):

> "Focusing attention upon Code § 18.1-63, the statute here in question, we emphasize that it deals with abortion, a matter vitally affecting public health and welfare and in the important realm of medicine. It is clearly within the police power of the state to enact reasonable measures to ensure that pregnant women in Virginia who decide to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder. And the state is rightfully interested in seeing that Virginia women who do decide to have abortions obtain proper medical care and do not fall into the hands of those interested only in financial gain, and not in the welfare of the patient.
>
> * * *
>
> "It is against the evils of such practices as are disclosed by the New York cases that the advertisement restriction in Code § 18.1-63 is designed to protect. This state has a real and direct interest in ensuring that

> the medical-health field be free of commercial practices and pressures, and we hold that Code § 18.1-63 is a reasonable measure directed to that purpose. *Semler* v. *Dental Examiners, supra,* 294 U.S. at 612-13."

In refusing to strike down the statute as being violative of the First Amendment due to overbreadth, the Supreme Court of Virginia authoritatively construed § 18.1-63 and excluded from its scope a doctor who advises a patient to have an abortion, or a husband who encouraged his wife to secure an abortion, or a lecturer who advocates a right to abortion. (213 Va. at 197, 191 S.E.2d at 177; J.S. 9a-10a.) Finally, because the Appellant's activity was of a purely commercial nature, the court below denied him standing to raise the hypothetical rights of those in the non-commercial zone. (213 Va. at 198, 191 S.E.2d at 177-78; J.S. 10a.)

Thereafter, the Appellant filed a Jurisdictional Statement and the Appellee filed a Motion to Dismiss or Affirm with this Court (No. 72-932). This Court vacated the judgment and remanded the case to the court below for further consideration in light of *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe* v. *Bolton,* 410 U.S. 179 (1973). (413 U.S. 909; A. 7) Upon remand, the Supreme Court of Virginia again affirmed the Appellant's conviction and stated, (214 Va. at 342, 200 S.E.2d at 680; J.S. 22a.):

> "Bigelow's is a First Amendment case. He was convicted not of abortion but for running in his newspaper a commercial advertisement for a commercial abortion agency. We held that government regulation of commercial advertising in the medical-health field was not prohibited by the First Amendment. We find nothing in the new decisions of *Roe* v. *Wade* and *Doe* v. *Bolton* which in any way affects our earlier view. So we again affirm Bigelow's conviction."

SUMMARY OF ARGUMENT

The sole issue in this case is whether a state may regulate purely commercial advertisements in the medical-health field. It does not involve a woman's constitutionally protected right to terminate her pregnancy by abortion. Nor does it involve the traditional role of newspapers of communicating information and disseminating opinion.

I. A state may regulate purely commercial advertising, *Pittsburgh Press* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973); *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942), especially when it relates to the medical-health field. *Williamson* v. *Lee Optical Co., Inc.*, 348 U.S. 483 (1955); *Semler* v. *Dental Examiners*, 294 U.S. 608 (1935).

A. The advertisement in question does no more than propose a sale of services. It expresses no opinion on whether, as a matter of social policy, a woman should bear a child; nor does it criticize the statute or its enforcement. Moreover, there is no editorial judgment present to strip the advertisement of its purely commercial nature.

B. The statute is clearly related to the state's interest in ensuring that the medical-health field be free of commercial practices and pressures.

II. In this case, where a line can be drawn between commercial and noncommercial conduct and the Appellant's conduct is clearly within the "hard core" of commercial activity unprotected by the First Amendment and prohibited by the statute, the Appellant lacks standing to raise the hypothetical rights of others. Furthermore, because the Supreme Court of Virginia has authoritatively construed the statute to prohibit commercial advertisements only, the continued existence of the statute, even before its amendment, could

not possibly have had the effect of deterring others in the exercise of their First Amendment rights. Thus, there is no justification for an application of the overbreadth doctrine in this case.

ARGUMENT

I.

A State, Exercising Its Police Powers To Protect The Health, Safety And Welfare Of Its Citizens, May Prohibit Purely Commercial Advertisements Of Commercial Abortion Referral Agencies.

This Court made it clear in *Pittsburgh Press* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973), that First Amendment protection will not be afforded purely commercial advertising. See also *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942). State regulation of such advertisements is permissible, especially where the advertisements relate to the medical-health field. *Williamson* v. *Lee Optical Co., Inc.,* 348 U.S. 483 (1955); *Semler* v. *Dental Examiners,* 294 U.S. 608 (1935). As the record amply shows, and as the Supreme Court of Virginia found, the advertisement under scrutiny here is of a purely commercial nature and thus is subject to the valid regulatory scheme embodied in § 18.1-63.

A.

The Advertisement Is Purely Commercial And Does No More Than Propose A Commercial Transaction.

It is conceded, as it must be, "that speech is not rendered commercial by the mere fact that it relates to an advertisement," *Pittsburgh Press, supra,* at 384, or by the fact that a newspaper is compensated for publishing the advertisement. *New York Times* v. *Sullivan,* 376 U.S. 254, 266 (1964). The crucial factor in determining the nature of an adver-

tisement is whether it does "no more than propose a commercial transaction." *Pittsburgh Press, supra,* at 385. Like the advertisement in *Pittsburgh Press,* the advertisement here can only be classified as purely commercial.

The advertisement expressly extends the offer by a commercial abortion referral agency to pregnant women to make all arrangements and to secure immediate placement in a hospital or clinic for an abortion. These services, however, are not supplied for free. As prominently mentioned in the advertisement, these services will be performed "at low cost." The advertisement, therefore, can only be viewed as a proposal for the sale of services.

> The printed words, whether read literally or rhetorically, can only mean that the agency, for a fee, will make the necessary business arrangements with doctors and hospitals or clinics to secure an abortion for the customer. Thus, the commercial nature of both the advertiser and the advertisement is patently revealed. 213 Va. at 193, 191 S.E.2d at 174-75; J.S. 4a.

While conceding that the advertisement proposes a commercial transaction, Brief for Appellant at 28, the Appellant contends that because of its content and the controversy surrounding its subject matter, the advertisement cannot be characterized as purely commercial. The advertisement did contain two lines in relatively small print which stated that "Abortions are now legal in New York" and "There are no residency requirements." One could hardly expect less, however, from an agency that was trying to induce individuals to purchase its services. While the Appellant would have the Court isolate and focus on these two lines apart from the balance of the advertisement, they must be considered in the context in which they appear. Of course, in another context these words might partake of some informational value. Here, in the context of the advertisement in question,

these lines constitute no more than an integral part of the overall commercial solicitation.[3] To accord them any greater dignity would be to transform a commercial advertisement into an informational bulletin. Likewise, the statement appearing at the end of the advertisement, "We will make all arrangements for you and help you with information and counseling," when read in the context in which it appears, is merely an elaboration on the description of services which will be made available for a fee.

In his brief, the Appellant further contends that the mere running of the advertisement constituted an implicit editorial opinion on the subject matter involved. The most obvious and direct response to this contention is that it is totally lacking for support in the record In addition, it cannot be said that this kind of alleged editorial judgment "strip[s] commercial advertising of its commercial character." *Pittsburgh Press, supra,* at 387. For this Court to hold otherwise would lead to the inevitable result that once any commercial advertisement is accepted for publication, it automatically becomes noncommercial speech. Thus, the distinction between commercial and other speech would be rendered totally meaningless.

The record will also not support a suggestion that § 18.1-63 was passed with any purpose of muzzling or curbing the press. Nor does the Appellant argue that the statute threatens the financial stability of the newspaper or impairs

[3] Indeed, the Appellant concedes that "the ad was more than a discussion supporting the idea of abortion, or calling for efforts to persuade a legislature to legalize abortion." Brief for Appellant at 15.

in any significant way the newspaper's ability to be published and distributed. Furthermore, the statute does not reach the layout or organizational decisions of the newspaper.

In sum, then, the Court is not confronted in this case with the traditional role of the press of disseminating information and communicating opinion. See *New York Times* v. *Sullivan, supra,* at 266. The advertisement does not express a position on whether, as a matter of social policy, a woman should bear a child, nor does it criticize the statute or its enforcement. The advertisement here does not even remotely resemble the advertisement in *New York Times* v. *Sullivan*. Quite simply, it does no more than propose a commercial transaction. Thus, the advertisement is one of the "classic examples of commercial speech," *Pittsburgh Press, supra,* at 385, which is in no way stripped of its commercial nature by editorial judgment. *Capitol Broadcasting Co.* v. *Acting Attorney General,* 333 F.Supp. 582 (D.D.C. 1971), aff'd, 405 U.S. 1000 (1972).[4] As pure commercial speech, the advertisement is subject to regulation by the Commonwealth. *Pittsburgh Press, supra; Valentine* v. *Chrestensen, supra.* And "a newspaper will not be insulated from the otherwise valid regulation of economic activity merely because it also engages in constitutionally protected dissemination of ideas." *United States* v. *Hunter,* 459 F.2d 205, 212 (4th Cir. 1972), *cert denied,* 409 U.S. 934. For the Court to reverse the Appellant's conviction, it

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[4] Cases such as *Capitol Broadcasting, New York State Broadcasters Ass'n.* v. *United States,* 414 F.2d 990 (2nd Cir. 1969), *cert. denied,* 396 U.S. 1061 (1970), and *Banzhaf* v. *F.C.C.,* 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom., Tobacco Institute, Inc.* v. *F.C.C.,* 396 U.S. 842 (1969), are also significant in their recognition that advertising can be regulated although the activity sought to be advertised is legal. See also *Valentine* v. *Chrestensen, supra.*

would have to repudiate the commercial speech doctrine most recently stated in *Pittsburgh Press.*

B.

THE STATUTE IS A VALID EXERCISE OF THE POLICE POWER OF THE STATE.

The standard of review to be applied to the statute in question has been clearly set forth by the Court in *McDonald* v. *Board of Election Com'rs.,* 394 U.S. 802, 809 (1969):

> "The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to ascertain their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them."

Quite clearly, § 18.1-63 meets this test.[5]

The Commonwealth has a definite and strong interest in seeing that the pregnant women in Virginia receive proper medical care. As stated by the Supreme Court of Virginia, 213 Va. at 196, 191 S.E.2d at 176; J.S. 7a:

> "Focusing attention upon Code § 18.1-63, the statute here in question, we emphasize that it deals with abortion, a matter vitally affecting public health and welfare and in the important realm of medicine. It is clearly within the police power of the state to enact

[5] Should the Court determine that the appropriate test is compelling state interest, the Commonwealth submits that it meets that test also. The compelling state interest is amply demonstrated by the New York cases. See text *infra* at 13-14.

> reasonable measures to ensure that pregnant women in Virginia who decide to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder. And the state is rightfully interested in seeing that Virginia women who do decide to have abortions obtain proper medical care and do not fall into the hands of those interested only in financial gain, and not in the welfare of the patient."

As noted by the court below, the necessity for and reasonableness of the statute is made obvious by an examination of the New York State experience following the legalization of abortion. After the passage of New York's liberalized abortion law, there grew a spate of abortion referral agencies, all limited to referrals to doctors, clinics and hospitals for the purpose of obtaining abortions. In terms of dollars and cents, the success of these enterprises was nothing short of phenomenal. See *S.P.S. Consultants, Inc.* v. *Lefkowitz,* 333 F. Supp. 1373, 1377 (S.D. N.Y. 1971) (three-judge court). In *S.P.S. Consultants,* the court rerejected attacks based on the First and Fourteenth Amendments against a statute prohibiting the operation of for-profit abortion referral agencies. The facts of that case show that advertising directed to out-of-state women contributed greatly to the success of these agencies. *Id.* at 1377. Perhaps this statement of a state senator quoted in *S.P.S. Consultants, supra,* at 1378, best describes the situation:

> "Because New York State has the most liberal abortion statute within the Continental United States, thousands of women from all over the country are coming into New York State, and particularly New York City, for abortions. We were astonished to learn at our Session last week that most of these women came here through referral agencies who advertise nationally.

> These agencies, for a sizable fee, make all abortion arrangements for a patient. We also learned that certain hospitals give discounts to these lucrative, profit-making organizations. Thus, at the expense of desperate, frightened women these agencies are making a huge profit—some, such a huge profit that our Committee members were actually shocked."

The Supreme Court of Virginia also referred to the case of *State* v. *Mitchell*, 321 N.Y.S.2d 756 (1971) and *State* v. *Abortion Information Agency, Inc.*, 323 N.Y.S.2d 597 (1971), which disclose that agencies were soliciting patients for and splitting fees with doctors and were acting as middlemen for doctors. They also disclose that agency personnel lacked medical training and that follow-up procedures after abortion were absent.

In light of the practices surrounding abortion referral agencies, it cannot be fairly said that § 18.1-63 is unrelated to a legitimate state end. As stated by the court below, 213 Va. at 197, 191 S.E.2d at 177; J.S. 9a:

> "It is against the evils of such practices as are disclosed by the New York cases that the advertisement restriction in Code § 18.1-63 is designed to protect. This State has a real and direct interest in ensuring that the medical-health field be free of commercial practices and pressures, and we hold that Code § 18.1-63 is a reasonable measure directed to that purpose. *Semler* v. *Dental Examiners, supra;* 294 U.S. 612-13."

The Commonwealth submits that the findings of the Supreme Court of Virginia are eminently correct and should be sustained by this Court.

The medical-health field has long been established as an appropriate field for the exercise of the police power of the states. See e.g., *North Dakota State Bd. of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973), *William-*

son v. *Lee Optical Co., Inc., supra; Barsky* v. *Board of Regents,* 347 U.S. 442 (1954); *Semler* v. *Dental Examiners, supra.* The General Assembly of Virginia, exercising that power, enacted § 18.1-63. It cannot be doubted that in light of the findings of the Supreme Court of Virginia, the statute is a reasonable and valid exercise of that power.

II.

The Overbreadth Doctrine Is Not Applicable To This Case.

The Appellant has mounted an additional attack upon § 18.1-63 contending that the statute is unconstitutional because of overbreadth.[6]. He alleges that:

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[6] In his brief, the Appellant also asserts that the statute runs afoul of three constitutional interests in addition to the First Amendment—the right of privacy, the right to travel and the "limitations upon the power of the states to penalize its citizens for actions unlawful in the state of residency but lawful when performed outside that state." Brief for Appellant at 18. The most immediate answer to these contentions is that they were not presented to the court below. J.S. 3a and 17a. Furthermore, these "constitutional interests" are not involved in this case. Section 18.1-63 does not regulate abortions, nor, as authoritatively construed by the court below, does it prevent the free flow of abortion information. Therefore, a woman's right to have an abortion is not an issue in this case. 214 Va. 341, 200 S.E.2d 680; J.S. 22a. Likewise, neither the statute nor the record will support an attack bottomed on the right to travel. Lastly, there is no conceivable manner in which § 18.1-63 can be read to prohibit or punish the obtaining of abortions outside Virginia. Appellant's contentions, therefore, are frivolous. This is, and always has been, a First Amendment case:

> "Bigelow's is a First Amendment case. He was convicted not of abortion but for running in his newspaper a commercial advertisement for a commercial abortion agency." 214 Va. 341, 200 S.E.2d 680; J.S. 22a.

For this reason, the Appellant's suggestion, Brief for Appellant at 20 n. 10, of a retroactive application of *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Doe* v. *Bolton,* 410 U.S. 179 (1973), is totally irrelevant. This probably accounts for the suggestion being relegated to footnote status. (footnote cont'd)

> "By it terms, it prohibits a speech urging that women have a right to obtain an abortion; it prevents a husband from discussing the possibility of an abortion with his pregnant wife; it prevents a Virginia doctor from suggesting that a patient obtain a legal abortion in Virginia or elsewhere; it suppresses abortion information supplied by a nonprofit, noncommercial agency; in fact, it prohibits appellant from writing and publishing an editorial which could be said to encourage abortion." Brief for Appellant at 35.

Facial overbreadth is an exception to the principle embodied "in the traditional rules governing constitutional adjudication," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973), that parties lack standing to challenge a statute on the ground of possible unconstitutional applications in hypothetical cases. Because allowing attacks on the basis of overbreadth is a departure from this time-honored principle, see e.g., *United States* v. *Raines*, 362 U.S. 17, 20-22 (1960), and because it creates a "judicial-legislative confrontation,"[7] it should be "employed by the Court sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, *supra*, at 613. Whether the rationale[8] underlying the overbreadth doctrine is said to be the chilling effect on the exercise of First Amendment rights, see e.g., *Gooding* v. *Wilson*, 405 U.S. 518, 521 (1972), or the possibility of "selective enforcement against unpopular causes," see e.g., *NAACP* v. *Button*, 371 U.S.

Of course, Virginia is bound to follow this Court's decisions in *Roe* v. *Wade* and *Doe* v. *Bolton*. In fact, Virginia's statutes regulating abortion were immediately interpreted after those decisions were handed down. See Report of the Attorney General of Virginia (1972-1973), at 1.

[7] Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L.Rev. 844, 852 (1970).

[8] See Torke, *The Future of First Amendment Overbreadth*, 27 Vand. L.Rev. 289, 295 (1974).

415, 435 (1963),[9] there is no basis for its application in this case.

As clearly demonstrated by the Supreme Court of Virginia, the Appellant's conduct was purely commercial. Under this state of facts, the Court's decision in *Breard* v. *Alexandria*, 341 U.S. 622 (1951), embodies the correct principle to be applied in this case. In *Breard* a door-to-door magazine salesman attacked on First Amendment grounds an ordinance prohibiting such salesmen from door-to-door solicitation without prior consent. In rejecting the attack, the Court stated: "Only the press or oral advocates of ideas could urge this point. It [is] not open to the solicitors for gadgets or brushes." *Id.* at 641. The Appellant contends that *Breard* is inapplicable here because the Appellant is a member of the press. This simplistic approach, however, overlooks the fact that this case does not concern the traditional role of the press of disseminating information and communicating opinion. In this case, the Appellant was involved in a commercial activity. As stated by the Supreme Court of Virginia, 213 Va. at 198, 191 S.E.2d at 178; J.S. 10a:

> "Thus, where, as here, a line can be drawn between commercial and noncommercial conduct and it clearly appears that the prohibited activity is in the commercial area, the actor does not have standing to rely upon the hypothetical rights of those in the noncommercial zone in mounting an attack upon the constitutionality of a legislative enactment. So we deny Bigelow standing to assert the rights of doctors, husbands, and lecturers."

The Appellant, therefore, should be denied standing to raise the hypothetical rights of others since his conduct was squarely within the "hard core" of commercial activity un-

[9] But see *Lewis* v. *City of New Orleans*, 415 U.S. 130, 142 n.2 (1974) (Blackmun, J., dissenting).

protected by the First Amendment and prohibited by the statute. *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 378 (1971) (Harlan, J., concurring). Cf. *Plummer* v. *City of Columbus*, 414 U.S. 2, 4 (1973) (Powell, J., dissenting).

Furthermore, facial overbreadth should not be applied here because the Supreme Court of Virginia has placed a limiting construction on the challenged statute. "Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick* v. *Oklahoma*, *supra*, at 613. Authoritatively construing § 18.1-63, the court below placed a limiting construction on the statute and held that it did not encompass the hypothetical cases raised by the Appellant. 213 Va. at 198, 191 S.E.2d at 177; J.S. 10a.

That the Court below construed the statute to permit the free flow of noncommercial speech and to prohibit only commercial is also apparent from its treatment of *Mitchell Family Planning, Inc.* v. *City of Royal Oak*, 335 F. Supp. 738 (E.D. Mich. 1972), a case relied on by the Appellant in the court below. In *Mitchell*, the court declared unconstitutional an ordinance prohibting the advertising of "any information concerning the producing or procuring of an abortion." The advertisement in question in that case merely offered "Abortion Information" and gave two telephone numbers that could be called. The Supreme Court of Virginia was quick to point out that both the ordinance prohibiting the mere dissemination of information and the noncommercial advertisement in *Mitchell* were quite different from the statute and advertisement under consideration here. 213 Va. at 197, 191 S.E.2d at 177; J.S. 8a.

Equally compelling is the court's language referring to the statute as "advertising legislation," 213 Va. at 196,

191 S.E.2d at 176; J.S. 7a, which is directed to "commercial practices, and pressures." 213 Va. at 197, 191 S.E.2d at 177; J.S. 9a. In light of the express language in and the entire tenor of the opinion of the court below, it cannot be fairly said that the court did not have the proper sensitivity for the freedoms of speech and press protected by the First Amendment, or that it did not limit the application of the statute to commercial advertisements. And, of course, "the words of Virginia's highest court are the words of the statute, *Hebert* v. *Louisiana*, 272 U.S. 312, 317. [This Court is] not left to speculate at large upon the possible implications of bare statutory language." *NAACP* v. *Button*, *supra*, at 432.

Therefore, this is not a case in which "the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights." *Coates* v. *City of Cincinnati*, 402 U.S. 611, 620 (1971) (White, J., dissenting). A blind application of the overbreadth doctrine in this case could not conceivably affect the rights of any one not before the Court, but would simply result in a windfall for the Appellant.[10]

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[10] An application of the overbreadth doctrine in this case would also amount to no more than an academic exercise. The *Amici*, Brief for *Amici Curiae* at 8, and apparently the Appellant, Brief for Appellant at 22, concede "that advertisements which aid or abet *illegal* activity may be prohibited." Brief for *Amici Curiae*, *supra*. Section 18.1-63 has been amended and in its present form refers only to abortions to be performed in Virginia which are illegal in Virginia. Because in its amended form § 18.1-63 would prohibit advertisements aiding and abetting an illegal activity, the Appellant and *Amici* would apparently agree that the statute as presently drawn would not run afoul of the First Amendment. Thus, in light of the amendment, justification for the application of the overbreadth doctrine is lacking.

CONCLUSION

The decision of the Supreme Court of Virginia is clearly in accord with the precedents laid down by this Court. The Commonwealth respectfully submits that this Court cannot, consistently with the principles that it has enunciated in *Valentine* and *Pittsburgh Press*, reverse the judgment of the court below. The Commonwealth respectfully requests that this Court adhere to its principles and affirm the judgment of the Supreme Court of Virginia.

Respectfully submitted,

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